and, if necessary, amend it and obtain a further plea thereon before calling upon the accused for his defence I do not think it is permissible after hearing the defence, to convict upon some different charge without specifically re-amending the charge, re-charging the accused and giving him an opportunity to recall witnesses and to defend himself upon the new charge.

For these reasons I decided that the conviction could not stand and I, therefore, set it aside and ordered a retrial, confined to the question of the possible excess of rice.

Retrial ordered.

ONG AH TOO v. REGINA

[C. C. A. (Whyatt C. J., Taylor and Tan Ah Tah JJ.) November 30, 1955]

[Singapore — Criminal Appeal No. 20 of 1955]

Criminal trial — Trial by jury — Direction — Necessity that Judge in summing-up should put the defence adequately to the jury — Penal Code ss. 149 & 300.

The appellant in this case was jointly charged with one Suppiah as follows: "That you, Ong Ah Too and Suppiah, son of Subramaniam, on or about the 12th day of May 1955 at or about 11.30 p.m. at or near Delta Road, Singapore did commit murder by causing the death of one Gene D. Symonds and that you thereby committed an offence punishable under s. 302 of the Penal Code (Cap. 20)". Alternatively: "That you, Ong Ah Too and Suppiah, son of Subramaniam, on or about the 12th day of May 1955 at or about 11.30 p.m. at or near Delta Road, Singapore, were members of an unlawful assembly the common object of which was to cause hurt to one Gene D. Symonds, and that while you were members of that assembly one or more members thereof committed murder by causing the death of the said Gene D. Symonds, an offence such as the members of that assembly knew to be likely to be committed in the prosecution of the common object thereof, and you are therefore guilty of an offence under s. 149 read with s. 300 of the Penal Code (Cap. 20) and punishable under s. 302 thereof."

Both accused were acquitted on the 1st charge and Suppiah was also acquitted on the alternative charge. The appellant was convicted on the alternative charge and sentenced to death. In his appeal against conviction, a number of grounds of appeal were raised, including the following: (a) that the jury were not sufficiently directed in regard to certain discrepancies in the evidence of the two eye-witnesses called by the prosecution; (b) that the direction to the jury on the subject of corroboration of an accomplice's evidence was not sufficiently explicit; and (c) that the appellant's defence of alibi was not adequately put to the jury in the summing-up.

Held: (1) there was a discrepancy in this case in the evidence of the two eye-witnesses as to the critical question of whether the appellant struck the victim or not during the first phase of the attack on the victim and this was a matter to which the jury's attention should have been directed in the summing-up; (2) the direction on the question of corroboration of the evidence of one of the eye-witnesses, who was an accomplice by the other eye-witness was unsatisfactory, as the learned Judge did not make any reference to the discrepancy in the evidence of the two witnesses on the important question of what the appellant actually did during the attack; (3) the learned Judge was wrong in this case in omitting to mention in his summing-up the evidence in support of the alibi and as the central issue in this case was the identification of the appellant, this omission resulted in the case for the defence not being adequately put to the jury; (4) for the above reasons, the appeal must be allowed and the conviction quashed.

COURT OF CRIMINAL APPEAL.

T. T. Rajah for the appellant.

H. B. Livingstone (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Whyatt C.J. (delivering the judgment of the Court): — The appellant and a person named Suppiah, son of Subramaniam, were charged at the September Assizes with the murder of Gene Symonds on the 12th May 1955, and alternatively with being members of an unlawful assembly which caused the death of Symonds in circumstances which made them guilty of murder contrary to sections 149 and 300 of the Penal Code. Both accused were acquitted on the first charge and Suppiah was also acquitted on the alternative charge. The appellant was convicted on the alternative charge and sentenced to death. He now appeals from that conviction.

Counsel for the appellant relied on over twenty different grounds of appeal. A number of them were misconceived and many were trivial and do not call for detailed mention in this judgment. But there are three matters of substance raised in this appeal which require careful consideration by this Court. They are, first, whether the jury were sufficiently directed in regard to certain discrepancies in the evidence of the two eye-witnesses called by the prosecution; secondly, whether the direction to the jury on the subject of corroboration of an accomplice's evidence was sufficiently explicit; and thirdly, whether the appellant's defence of an alibi was adequately put to the jury in the summing-up.

No one sought to dispute at any time during this case that Gene Symonds was attacked and murdered by a mob on the night of the 12th May. The only point at issue was whether it was established that the appellant was a member of the mob and had taken part in the attack in circumstances which made him guilty on one or other of the charges.

The prosecution sought to prove this issue by the evidence of two witnesses, Goh Ah Pong and Seet Bah Cheng. Various aspects of this evidence were properly criticised by counsel for the defence and the learned Judge was careful to mention these matters to the jury in his summing-up. But there was one discrepancy which we think was of considerable importance on which he did not comment in his summing-up. Both

Goh Ah Pong and Seet Bah Cheng claimed to be eye-witnesses of the first phase of the attack on Symonds but they gave seriously divergent accounts of the part played by the appellant during that attack. Goh Ah Pong said that the appellant merely milled around with his hands whereas Seet Bah Cheng said that he saw the appellant hit Symonds on the head with a "green spot" box until it broke to pieces. It is not, of course necessary for a Judge, when summing-up, to mention every discrepancy in the evidence of the prosecution's witnesses but where, as here, the discrepancy concerned the critical question of whether the accused actually struck the victim or not during this phase of the attack, we think it was a matter to which the jury's attention should have been directed in the summing-up.

There was, in this case, strong evidence that Goh Ah Pong was an accomplice and therefore it was necessary that the jury should be warned clearly of the danger of convicting the appellant on his evidence unless it was corroborated by independent testimony which implicated the appellant in the commission of this crime. The learned Judge directed the jury at some length on the subject of corroboration and in doing so, laid particular emphasis on the evidence of two on-lookers, Lim Siong Choon and Lim Heng Tong. It is quite true that these two witnesses confirm the general outline of Goh Ah Pong's story but they could give no evidence identifying or even tending to identify, the appellant with the commission of the crime and hence their evidence cannot be regarded as corroborative of the accomplice's evidence in a material particular implicating the appellant. The only evidence which corroborated Goh Ah Pong in the sense that it implicated the appellant in the commission of this crime was that of Seet Bah Cheng, who said that he saw the appellant taking part in the assault during the first phase of the attack. The learned Judge made a brief reference to this evidence when dealing with corroboration in his summing-up but as already mentioned, he did not point out that Seet Bah Cheng's evidence conflicted with the evidence of Goh Ah Pong on the important question of what this appellant actually did during the attack. If the reference to Seet Bah Cheng's evidence had been qualified by a reference to this discrepancy, as we think it should have been, the jury might well have thought that it would be unsafe to treat Seet Bah Cheng's evidence as reliable corroboration of Goh Ah Pong's evidence and, in consequence, might have reached a different conclusion.

Finally there is the question whether the appellant's defence of an alibi was adequately put to the jury in the summing-up. Counsel for the appellant complained that six witnesses were called in support of the appellant's story but no reference was made to their evidence by the learned Judge when he summed up to the jury. Counsel for the appellant overstated his complaint in this matter as several of the witnesses whom he called gave only formal evidence and therefore it was quite unnecessary for the learned Judge to mention their evidence in his summing-up. There were, however, two witnesses for the defence, Koh Heng Ying, the wife of the appellant, and a man named Tan Bah, who gave material evidence in support of the alibi which, if believed, would have established the innocence of the appellant, but no reference was made to these witnesses by the learned Judge in his summing-up beyond reminding the jury that they had heard the comments of counsel for the prosecution and the defence with regard to them and it was for the jury to come to their own conclusions. Now it is a paramount principle of law that the case for the defence must be put adequately to the jury in the summing-up. This does not mean that it is a misdirection not to tell the jury everything in favour of the defence which might be told to them; nor does it mean that a summing-up which contains omissions, even important omissions, is necessarily defective if the accused's counsel has sufficiently drawn attention to the evidence so that its bearing on the case cannot have been absent from the minds of the jury when they considered their verdict. Every summing-up must be regarded in the light of the conduct of the trial as a whole including the questions raised by counsel for the prosecution and the defence. But on the particular facts of this case, where the central issue was the identification of the appellant, we think the omission to mention in the summing-up the evidence in support of the alibi resulted in the case for the defence not being adequately put to the jury.

For these reasons, we are of the opinion that this appeal must be allowed and the conviction must be quashed.

Appeal allowed.

Solicitors for the appellant: *Mallal & Namazie.*